Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

WOLVERINE, LTD., SHELDON M. SISSON, A PARTNER OTHER THAN TAX MATTERS PARTNER; WOODCHUCK, LTD., SHELDON M. SISSON, A PARTNER OTHER THAN TAX MATTERS PARTNER,

PETITIONERS

V.

COMMISSIONER INTERNAL REVENUE SERVICE,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is there an appearance of impropriety and/or a conflict of interest:

(A) when an Internal Revenue Service (IRS) attorney leaves the Los Angeles office of the IRS, and

(B) two or three weeks later appears as co-counsel for the taxpayers in a Los Angeles case being tried before the Tax Court, and

(C) concedes the principal argument of the taxpayers?

2. May the IRS refuse to honor a settlement signed by IRS officials who have the authority to bind the IRS--the District Director, the Chief of Appeals, and the Chief of Examinations?

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OPINIONS BELOW IN THIS CASE

The decision of the Court of Appeals for the Ninth Circuit is not reported. The decision appears at Appendix, Volume I, page 1 et. seq.

The decision of the United States Tax Court, T.C. Memo. 1992-669, is not officially reported. The decision is unofficially reported at 1992 T.C.M. (RIA) Par. 92,669 (1992) and 64 T.C.M. 1342 (CCH) (1992). The decision appears at Appendix, Volume I, page 3 et. seq.

JURISDICTION OF THE SUPREME COURT

1. The judgment of the Court of Appeals for the Ninth Circuit was entered on October 24, 1994. Rule 14.1.(e)(i) of the Rules of the Supreme Court of the United States (hereinafter, "Rule").

2. There was no order respecting a rehearing before the Court of Appeals for the Ninth Circuit. There was no extension of time sought or granted in which to file this petition for writ of certiorari. Rule 14.1.(e)(ii).

3. Section 7482 (a)(1) of the Internal Revenue Code confers jurisdiction in the Supreme Court of the United States to review the judgment of the Court of Appeals for the Ninth Circuit by writ of certiorari.

4. The United States Tax Court, the court of first instance, had federal

jurisdiction pursuant to Sections 6226(f) and 7442 of the Internal Revenue Code. Rule 14.1.(i).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

Aside from the jurisdictional provisions cited, supra, no constitutional provisions, treaties, statutes, ordinances or regulations are deemed to be involved in this case.

FACTUAL STATEMENT OF THE CASE

About 4,000 partners invested a total of about $200,000,000 in several hundred partnerships each owning real property leased to the United States Postal Service, the General Services Administration or various public utilities (the Schulman partnerships).

In 1988 an attorney from the

Office of the District Counsel of the IRS in Los Angeles, Karl Zufelt, left the IRS. Two or three weeks after he left the IRS, Zufelt switched sides and appeared as co-counsel in a tax case affecting a husband and wife in one Schulman partnership case being tried before the United States Tax Court in Pasadena CA.

The case in which Zufelt appeared is Marine v. Commissioner, 92 T.C. 958 (1989), aff'd without published opinion, 921 F.2d 280 (9th Cir. 1991), cert. denied, 112 S.Ct. 77 (1991). The adverse decision in Marine later was used by the IRS to convince other partners in other cases to concede.

I was a witness at the trial in Marine. I learned, after the trial, from Benjamin Duncan, whose name appears in Marine as one of the counsel

for the IRS, that Zufelt, one of the two attorneys for the taxpayers in Marine, had just left the IRS.

At a motions session prior to the trial of Marine, counsel for the Marines conceded that the Settlement Plan Agreement, infra, was not binding on anyone. The transcript of that motions session forms part of the record below.

Zufelt's name does not appear in the official reports of the Tax Court as co-counsel in the case. There is no indication in Marine that a former IRS attorney had appeared on behalf of the Marines or that the Marines knew that they were represented by a former IRS attorney or that the former IRS attorney had conceded, in my opinion, the principal argument of the taxpayer.

After months of negotiations, in August, 1983, a "Settlement Plan

Agreement" was signed by (1) IRS officials in Los Angeles and (2) the general partner. The agreement governed (A) the tax consequences to the partners of their investment in the partnerships and (B) taxed certain gains and income to the general partner.

The agreement, Appendix Volume II, page 45, et. seq., was signed on behalf of the IRS by the District Director, and the Chief of Appeals, and the Chief of Examinations.

ARGUMENT FOR ACCEPTANCE OF THE PETITION FOR WRIT OF CERTIORARI

What happened in this case is clear. There also is more to this case than meets the eye at the present time.

Why should the Supreme Court exercise its power of supervision over the judiciary in accordance with Rule 10.1.(a)?

Rule 7 of the Rules of the Supreme Court presents the accepted standard for avoidance of conflict of interest and appearance of impropriety. The Rule provides in part:

> "[N]or shall any person after leaving employment in this Court participate, by way of any form of professional consultation or assistance, in any case pending before this Court or in any case being considered for filing in this Court, until two years have elapsed after separation; nor shall a former employee ever participate, by way of any form of professional consultation or assistance, in any case that was pending in this Court during the employee's tenure."

Something is wrong when an IRS attorney is allowed to switch sides and concede the taxpayers' principal argument. Why did the local IRS attorneys not object to Zufelt's appearance in Marine?

The Tax Court should not have allowed an IRS attorney to change sides

and participate in the concession.

The Ninth Circuit should not have allowed an IRS attorney to change sides and participate in the concession.

The Tax Court dismissed my complaint about the issue of former employment as follows:

> "Petitioner's attacks on one of the counsel [Karl Zufelt] for the taxpayers in Marine are based on that counsel's former representation of respondent. We can draw no inference from this fact. [Appendix Volume I, page 44]"

The portion of my complaint about Zufelt's participation in the concession of the Settlement Plan Agreement was ignored.

The Tax Court's citation of Estate of [Nat "King"] Cole v. Commissioner, T.C. Memo. 1973-74, to justify what Zufelt did in Marine, is not relevant. I tried Cole for the IRS prior to 1973.

I left the IRS in August 1974. I joined Harry Margolis in 1979. I did not leave the IRS, appear in Cole a couple of weeks later on behalf of the taxpayer, and then concede the main issue of the taxpayer.

The Settlement Plan Agreement

Why should the Supreme Court exercise its power of supervision in accordance with Rule 10.1.(a)?

The IRS should be required to honor its agreements signed by IRS officials who have the power to bind the IRS.

The Tax Court cited Boulez v. Commissioner, 76 T.C. 209 (1981), affd. 810 F.2d 209 (D.C. Cir. 1987) for the non-binding effect of an agreement with an IRS agent. The agent was more than an agent. He was the Director of the Office of International Operations.

The Department of Justice in its brief in Boulez, supra, before the Circuit took the position that had the agreement with the Director of the Office of International Operations been in writing the agreement would have been binding.

The Tax Court below stated:

> "The cases of Karme [v. Commissioner, 73 T.C. 1163 (1980) affd. 673 F.2d 1062 (9th Cir. 1982)] and Marine [supra] involved facts indistinguishable from those in this case (although the evidence in this case contained many gaps)."

Karme is not relevant. It precedes the signing of the Settlement Plan Agreement (sometimes hereinafter "SPA" or "agreement") and is part of the background that led both sides to sign the Settlement Plan Agreement in 1983.

The Settlement Plan Agreement calls for "utmost good faith." After the agreement was signed an IRS attorney,

one of the IRS attorneys who appears in Marine, in clear violation of the SPA, demanded (1) $50,000,000.00 in liquidated damages and (2) that Schulman agree to do nothing within the scope of the Internal Revenue Code for the remainder of his life as a condition for proceeding with the agreement. This hardly qualifies as "utmost good faith."

In accordance with the terms of the Settlement Plan Agreement and in reliance upon the SPA, both Wolverine and Woodchuck claimed only 70% of what they otherwise would have been entitled to claim as a deduction.

We provided all the documentation required under the terms of the SPA on a timely basis. What remained to be done to complete the terms of the Settlement Plan Agreement for the partners of Wolverine and Woodchuck? A letter from

the IRS that said: "In accordance with the terms and conditions of the Settlement Plan Agreement between the IRS and your general partner, this is to inform you the deduction you claimed from [blank] partnership is accepted" is all that was needed.

If ever there were a tortious bad faith denial of a contract and "stonewall"ing within the California framework of Seaman's Direct Buying Service, Inc. v. Standard Oil Co., 36 Cal.3d 752, 206 Cal.Rptr. 354, 686 P.2d 1158 (1984), this is the case.

Instead of "see you in court," we find the equivalent of "drop dead." If I had been Gerald L. Schulman, the partnerships would have sued the IRS in tort under Seaman's and sought specific performance.

Was the Settlement Plan Agreement a

"conditional and precursory agreement?" Was the Settlement Plan Agreement a "routine example of preliminary settlement negotiations?" Since when do the District Director, and the Chief of Examinations and the Chief of Appeals all get involved in routine examples of preliminary settlement negotiations?

Nothing in Sections 2.6 or 4.1 of the SPA stood in the way of completion. Appendix, Volume II, page 48, et. seq.

Sec. 2.6(a)(i): The SPA was signed.

Sec. 2.6(a)(ii): There was subsequent "actual verification of tax due in accordance with the principles established under the Settlement Plan Agreement."

Sec. 2.6(b)(i): As for a final settlement agreement, for 1983, all that was needed was a form letter from the

IRS containing a few sentences.

Sec. 2.6(b)(ii): Schulman did communicate to investors with respect to the settlement proposal.

Sec. 2.6(b)(iii): As for a final settlement agreement, for 1983, all that was needed was a form letter from the IRS containing a few sentences.

Sec. 2.6(b)(iv): Final determination of Schulman promoter income was the responsibility of the IRS.

Sec. 3.7 of the agreement spells out how promoter income is determined.

Sec. 2.6(b)(v): The trust(s) were formed.

Sec. 4.1(a): There never was an indication by either side that the "taxes determined to be due under the terms of the within settlement proposal" were not reasonable under all of the

circumstances.

Sec. 4.1(a) also is modified by the following:

1. Sec. 4.1(a)(i): Trust income for 1983 and subsequent years will be determined in accordance with the terms of the SPA and the result of that determination will not affect the agreement.

2. Sec. 4.1(a)(ii): The examination of Schulman's 1040 tax returns pertaining to non-post office items shall be accomplished at a later date and the result thereof shall not affect the SPA.

3. Sec. 4.1(b): The audit result of Schulman's 1040s for 1977 through 1982 must be acceptable to Schulman and to the IRS but (i) the result of the audit for 1983 shall not affect the SPA and (ii) the examination of Schulman's

1040s pertaining to non-post office items shall be accomplished at a later date and the result shall not affect the SPA.

Any fair reading of section 4.2 of the agreement is that there is a binding obligation to go forward with the agreement unless (1) section 4.1 is not completed within a time certain and (2) written notice to the other party of the cancellation of the agreement is given.

No written notice of cancellation ever was given. The agreement was binding. All that was missing was a little good faith on the part of the IRS.

As for the intellectual rationale for applying the doctrine of equitable estoppel against the government with the utmost caution and restraint: It is good public relations for a government

to turn square corners with its citizens. It is bad public relations for a government to do anything else.

We did not have to invest in the partnerships after the agreement was signed by three officials of the Internal Revenue Service, the District Director, the Chief of Examinations, and the Chief of Appeals, who had the power to bind the IRS. Had we known what was to come we could have done something sensible -- such as buy short term tax free municipal bonds. In retrospect the unreasonable conduct on our part was to expect that the IRS would not try to wiggle out of an agreement.

The government below, citing Manocchio v. Commissioner, 710 F.2d 1400 (9th Cir. 1983), would require a "profound and unconscionable injury" before applying equitable estoppel.

How many nails are required before an injury becomes both profound and unconscionable?

How many times may a government attorney freely switch sides before the injury becomes both profound and unconscionable?

How many Kamman letters may be written before the injury becomes both profound and unconscionable? Appendix, Volume II, page 74, et. seq.

How many hundreds of millions of dollars must be lost by investors before the injury becomes both profound and unconscionable?

PRAYER

The Petitioners pray that the Court accept this Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, and that the Court hear this case, and that the Court find for the Petitioners with the relief as prayed below, viz., that there is no partnership item adjustment to ordinary income for Wolverine, Ltd. for the 1983 taxable year and that there is no partnership item adjustment to ordinary income for Woodchuck, Ltd. for the 1983 taxable year.

This Petition is respectfully submitted.

January 20, 1995
Date

Sheldon M. Sisson